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No. 02-1609

In the Supreme Court of the United States

THE CITY OF LITTLETON,
Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a COLORADO LIMITED LIABILITY COMPANY d/b/a CHRISTAL'S,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

SCOTT D. BERGTHOLD
Counsel of Record
LAW OFFICE OF SCOTT D. BERGTHOLD
6830 MCCUTCHEON ROAD
CHATTANOOGA, TN 37421
(423) 899-3025

Counsel for Amici Curiae
(Counsel continued on inside cover)

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LANI WILLIAMS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION
1110 VERMONT AVENUE, NW
WASHINGTON, DC 20005
(202) 466-5424

JUAN OTERO
NATIONAL LEAGUE OF CITIES
1301 PENNSYLVANIA AVE., NW
SUITE 550
WASHINGTON, DC 20004
(202) 626-3022

Counsel for Amici Curiae

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INTEREST OF *AMICI*[1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is comprised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues; and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program has served municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as a friend of the court on behalf of its members before this Honorable Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

[1] Pursuant to Rule 37.6, *amici curiae* International Municipal Lawyers Association ("IMLA") and National League of Cities ("NLC") disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

Amici and their members are specifically concerned about the proper resolution of the issue presented by the City of Littleton's petition. The circuit court split over judicial review of licensing decisions for erotic businesses has been accurately described as an imbroglio that needs this Court's intervention. *Midvale City Corp. v. Haltom*, 2003 Utah Lexis 55 (May 16, 2003). The confusion attendant to the circuit split has impeded municipal efforts to control the adverse secondary effects of sexually oriented businesses through narrowly tailored regulations. *Amici*, as an advocate for the interests of local governments and the communities they serve, file this brief on behalf of their members nationwide. Letters from both parties consenting to the filing of this amici curiae brief are on file with the Clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by Petitioner, City of Littleton.

REASONS FOR GRANTING THE WRIT

This Court has twice granted certiorari to resolve the issue raised in the petition, but in both cases lacked occasion to reach the issue. *See Thomas v. Chicago Park District*, 534 U.S. 316, 325-326 (2002); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281 (2001). The split in the circuits has since expanded to include the Tenth Circuit, and the reasons for granting certiorari to review its judgment below are compelling.

1. This case presents an ideal vehicle to resolve the circuit split.

First, unlike in *City News*, no specter of mootness infects this case, as respondent remains in business and the justiciable controversy between the parties continues. Indeed, even if Z.J. Gifts were to now cease operations in Littleton, the ever-increasing number of cases addressing this important issue demonstrates that the controversy is capable of repetition, although it has thus far evaded review by this Court.

Second, unlike the ordinance in *Thomas*, the Littleton ordinance is narrowly targeted – as it must be, *see Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52-53 (1986) – to regulate sexually oriented enterprises, and thus presents the question upon which the lower courts are split.[2]

[2] Two important observations are warranted here. First, the Littleton ordinance regulates the location and operation of sexually oriented *businesses*, not speech, regardless of whether the businesses engage in protected expression. Hence, the ordinance regulates non-speech businesses such as "sexual encounter centers" and day-rate motels classified as "adult motels." *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 247-248 (1990) (White, J., concurring in part and dissenting in part) ("Neither is there any basis for holding that businesses dealing in expressive materials have been singled out; all sexually oriented businesses -- including those not involved in expressive activity such as escort agencies -- are covered..."). Second, the split in the circuits goes beyond sexually oriented business regulation to include regulations of expressive conduct in other venues. *See Thomas*, *supra* at 325 (citing *Jews for Jesus v. Massachusetts Bay Transportation*, 984 F.2d 1319 (1st Cir. 1993) (expressive activity in airports) and *Graff v. City of Chicago*, 9 F.3D 1309 (7th Cir. 1993) (*en banc*) (upholding permit regulations governing newsracks).

2. The persistent confusion in the lower courts damages the interests of local governments and the communities they serve.

In recent years, cities have suffered the unwarranted invalidation of numerous local ordinances for circumstances that are beyond municipal control and for reasons that are inconsistent with this Court's rulings on time, place, and manner regulations.

Municipalities have been the losers in the midst of this ambiguity while, to the best of amici's collective knowledge, no adult business has ever been prevented from obtaining judicial review of an adverse licensing decision.

Despite the staggering impacts of rulings striking municipal ordinances for failing to guarantee a court of law's prompt decision – including facial invalidation of entire ordinances and large attorney fee awards – the judicial explanations for the "prompt judicial decision" rule in the present context have been wholly unpersuasive. On the other hand, the problems created by the rule are many.

As an initial matter, courts requiring a guarantee of prompt court decision have either, like the Tenth Circuit, have ignored the obvious – that a city can guarantee no such thing – or have held that despite the impossibility of the requirement, the local ordinance must be invalidated anyway. *See Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. Lexis 13477, *24 (E.D. Cal. 1999) (unpublished) ("In sum, *Freedman* and *Baby Tam and Co.* insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions – however impractical they may be – are the law.")

Second, the "local-legislatures-must-control-judicial-dockets" concept underlying the prompt judicial decision rule runs headlong into limitations on municipal authority as well as the separation of powers doctrine. As the Sixth Circuit observed: "Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893-894 (6th Cir. 2000). The court in *Mai Lee Le*, *supra* at 23, noted the separation of powers problem that would arise if state legislatures were to inject limitations on courts' constitutional adjudications. *Mai Lee Lee*, supra at 23 ("It has been suggested that the California Legislature would [prescribe judicial deadlines] – at least with respect to state judicial officers – but even the state's authority is doubtful.")

The third harm manifested in decisions requiring a city to guarantee prompt judicial decisions is a not-so-subtle disparagement of city officials and state courts. *Amici* are particularly concerned about the view, espoused by the Tenth Circuit in this case, that city officials are either incompetent or, worse, unwilling to follow the clear and objective requirements of their own ordinances. After the lower court recognized that the impetus for *Freedman* analysis (censorship) was inapposite to this case, the court nevertheless opined:

> Even if the rationale behind Freedman is specific to censorship cases, there is an equally valid rationale for requiring prompt judicial review in adult-business licensing cases.... A licensing official *may have little or no discretion in reviewing an application, but he or she may be tempted nonetheless to overstep the bounds of the ordinance*.

311 F.3d at 1238 (emphasis supplied).

This speculation, an attack on the integrity of public officials, is wholly unwarranted and unsupported by any facts relevant to this case. Indeed, if the lower federal courts can simply presume bad faith on the part of public officials, it matters not what procedural protections appear on the face of ordinances – federal courts may, by fiat, act as though they do not exist. The invalidation of ordinances would be justified simply based on the courts' hypothesis that:

> [T]he *possibility* exists that licensing officials *might* allow their personal views on the morality of sexually explicit entertainment *to sway* a decision on an application. Given the *strong feelings* that adult businesses can engender, there must be a prompt judicial determination to ensure that licensing officials do not exceed their authority under the ordinance *in their zeal* to protect the community.... [T]he danger that an ordinance like Littleton's may be improperly used as a *subterfuge for censorship* is too great to overlook....

Id. (emphasis supplied).

In light of the foregoing, one must wonder how such conjecture - which paints public officials as incapable of following clear ordinance standards - could serve as the "equally valid rationale" that justified invalidation of the Littleton judicial review provisions. *Amici* submit that not only is this unjustified speculation foreign to sound constitutional analysis, but that it is also contrary to this Court's view that public officials are entitled to "a presumption of honesty and integrity," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), in the absence of facts to the contrary.

This unsupported view of public officials, however, is not limited to municipal employees. The "prompt judicial decision" courts have also suggested that state courts hearing factual or constitutional challenges to licensing decisions are not responsive to constitutional requirements.

For example, the Sixth Circuit – rejecting the judicial review provided under Kentucky law – stated that "we cannot be sure that a state judge, *who often is elected* and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner." 202 F.3d 884, 892 (6th Cir. 2000) (emphasis added) (rejecting district court's assumption that state court would speedily issue injunctive relief if risks to constitutional rights made it necessary). Again, the expressed presupposition – inherently damaging to federal-state relations – is that state judicial officers are less than competent to act swiftly to protect constitutional rights.

This view is no more than "an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Steffel v. Thompson*, 415 U.S. 452, 460-62 (1974).

Finally, perhaps the most obvious vice of the prompt judicial decision rule – when applied in a content-neutral context for which is it was not designed – is that it eviscerates prophylactic measures designed to prevent the secondary effects of sexually oriented enterprises. Some "prompt decision" courts have suggested that, to solve "prior restraint"[3] restraint problems, cities can simply give

[3] This case also gives the Court the opportunity to clarify the prior restraint doctrine. The decision in *Thomas v. Chicago Park*

provisional licenses to adult businesses that seek judicial review of adverse licensing decisions. *See Nightclubs*, *supra* at 894; *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 1001 n. 18 (4th Cir. 1995) (*en banc*).

The most obvious defect in these judicial suggestions is that they require municipalities to passively allow the unregulated environments that foster secondary effects while the businesses – protected by provisional licenses pursuant to ordinances under which they are objectively unqualified – pursue (at a slower pace, no doubt) judicial resolution of their claims.

For example, most adult business licensing ordinances prohibit the employing of minors in an adult business. If a business applicant were recently convicted of knowingly employing a minor in a sexually oriented business,[4] the City

District, 534 U.S. 316 (2002) reiterated that "prior restraint" analysis should not be invoked for every regulation that requires a permit before engaging in an activity which may or may not be associated with expression. Rather, prior restraint – at its core – involves either content-based censorship of expressive materials or unbridled discretion in which amorphous standards serve as a mask for censorship. *Id.* at 320-321. This case involves neither vice. As the Tenth Circuit observed, the Littleton ordinances gives officials "little or no discretion in reviewing an application." 311 F.3d at 1238. *See also*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-230 (1990) ("Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.")

[4] *See, e.g.*, Daniel Borunda, *Police Find 4 Teenage Strippers*, El Paso Times, May 30, 2003, at A1 ("In an affidavit for that search warrant, another 15-year-old girl described a 'don't ask/don't tell'

would deny a license to the business on this objective, content-neutral ground. In a "prompt judicial decision" jurisdiction, however, the City would be required to give a provisional license to the applicant, which would go beyond maintaining the status quo to allowing the club to open and operate until the conclusion of its lawsuit. *See Nightclubs*, *supra*, at 894 (holding that "a city may very well have to go beyond merely maintaining the status quo and actually permit" the operation of the business.") But this presents the obvious problem of permitting an unqualified – or improperly zoned, or habitually offending, etc. – adult business to operate when valid reasons, having nothing to do with speech, would justify license denial.

Moreover, even granting provisional licenses to unqualified businesses is no guarantee that an ordinance will be upheld under the "prompt judicial decision" rule. Indeed, some courts have – even after suggesting a provisional license remedy, *see Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 894 (6th Cir. 2000) – continued to invalidate ordinances, notwithstanding that the ordinances provide a provisional license or a stay of enforcement allowing aggrieved applicants to operate *until the conclusion of judicial review*. *See Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001) (holding that local government must guarantee prompt judicial decision, notwithstanding ordinance provision barring enforcement until a court's ruling on the merits); *Deja Vu of Cincinnati, L.L.C. v. Union Township Board of Trustees*, 326 F.3d 791 (6th Cir. 2003) (holding that temporary permit allowing operation during judicial review was insufficient).

environment, in which she was offered cocaine by customers and had sex with patrons for money in 'VIP' rooms.").

In essence, as applied to adult business licensing ordinances that otherwise satisfy intermediate scrutiny, the "prompt judicial decision" rule says this: Even when a license denial is completely unrelated to the suppression of expression and narrowly tailored to serve a significant government interest (as it must be to satisfy the time, place, and manner test[5]), cities must either guarantee prompt judicial decisions on appeals from license denials (an impossibility), give provisional licenses to unqualified businesses (a capitulation of their regulatory interests which may or may not suffice), or risk invalidation of their ordinances (a total loss).

Amici's concern over this imbroglio is heightened due to recent expansion of the "prompt judicial determination" requirement to encompass content-neutral license suspensions and revocations which, by definition, are sanctions imposed

[5] Neither party is suggesting that adult business licensing ordinances do not have to satisfy the four-part test for time, place, and manner regulations of expressive conduct. That is, they must: (1) be justified by content-neutral reasons, (2) be designed to serve substantial government interests, (3) be narrowly tailored to serve those interests (e.g., must not restrict substantially more speech than necessary to advance those interests), and (4) must leave open adequate alternative avenues of communication. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968) (stating test in slightly different language). More important, as discussed below, this Court has recently reiterated that there are procedural requirements that inhere in the time, place, and manner test. *Thomas v. Chicago Park District*, 534 U.S. 316 (2002). That is, the regulations must "contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. Amici contend that these substantive and procedural standards are more than sufficient to satisfy the First Amendment when an adult business challenges a content-neutral license denial.

subsequent to, not prior to, expressive activity. *See,e.g., 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (allegedly implementing "the policy consideration underlying this [prompt judicial decision] safeguard" by extending prior restraint analysis to content-neutral licensing sanctions *subsequent* to licensure and operation) (brackets and emphasis supplied).

This Court addressed the fundamental distinction between initial licensing and post-permit enforcement of content-neutral regulations in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, (2001):

> Full briefing and argument have revealed that the question City News tendered, and which we took up for review, is not now and never was accurately reflective of City News's grievance. Unlike the initial license applicant whose expression cannot begin prepermission (the situation of the complainant in *Freedman*), City News was already licensed to conduct an adult business and sought to fend off a stop order.

Id. at 285; *accord Alexander v. United States*, 509 U.S. 544 (1993) (distinguishing censorial prior restraints from valid sanctions that impact future speech); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (same); *see also Jakes, Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir. 2002) ("Jake's cites no authority for the proposition that the prior restraint standards of City of Lakewood and FW/PBS apply equally to license suspensions and revocations. The proposition is inherently suspect, because license revocation is necessarily less of a *prior* restraint than the initial licensing process.")

The confusion engendered by the "prompt judicial review" rule, as applied not only to initial licensing decisions

based on content-neutral regulations, but also to *post*-licensure sanctions under those regulations, is an additional reason that this Court should grant certiorari and resolve the split in the circuits.

***

Amici submit that each of the foregoing problems warrant this Court's intervention. The greatest problem, however, with requiring cities to guarantee a "prompt judicial determination" is not the requirement's admitted impossibility, its obvious conflict with separation of powers, its anti-federalism underpinnings, nor even its evisceration of municipal authority to control secondary effects.

Rather, the fundamental problem is that this necessary safeguard for content-based prior restraint schemes has no coherent analytical life when detached from its censorship roots. Its inapposite application to ordinances which do "not authorize a licensor to pass judgment on the content of speech," *Thomas*, *supra* n.5 at 322, generates more problems than it attempts to solve. In a typical adult business ordinance that otherwise meets intermediate scrutiny, e.g., where "[n]one of the grounds for denying a permit has anything to do with what a speaker might say," *id.*, the prompt judicial decision rule unnecessarily thwarts municipal planning and regulation of secondary effects to the detriment of communities. As discussed below, the First Amendment does not require such a result.

3. This Court's precedents provide a well-balanced solution to the judicial review quandary.

Amici submit that this Court's ruling in *Thomas* offers a coherent solution to the circuit split and should guide its

resolution of this case. Specifically, *amici* urge the Court to grant certiorari and rule that content-neutral time, place, and manner regulations for sexually oriented businesses are constitutional provided that they: (1) avoid unfettered discretion (including undue delay in permitting decisions), (2) allow prompt access to effective judicial review, and (3) otherwise meet the test for content-neutral time, place and manner regulations. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *United States v. O'Brien*, 391 U.S. 367 (1968).

This is the appropriate standard, despite the fact that adult business ordinances identify the sexual nature of the regulated businesses by reference to the materials sold and performances offered. Indeed, under this Court's precedents, they *must* do so in order to be narrowly tailored toward secondary effects and avoid unconstitutional overbreadth.

Twenty-seven years ago, this Court decided its first case concerning local zoning and licensing controls employed to prevent the admittedly serious problems caused by establishments classified as "adult" businesses. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1974). Rejecting the adult theaters' assertion that Detroit's licensing requirement constituted an impermissible prior restraint, a majority of the Court held that the city's classification of theaters specializing in erotic fare was justified by the city's desire to control the adverse impacts of those commercial enterprises. *Id.* at 62-63 ("[T]he mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and licensing requirements is not a sufficient reason for invalidating these ordinances.")

Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court reiterated that such

classification was necessary to ensure that the city's regulation was "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *Id.* at 52.

Municipalities which have adhered to these cases should not have to suffer the continued invalidation of ordinances which do not permit censorship, do not vest city staff with unbridled discretion, and do not otherwise run afoul of intermediate scrutiny simply because those ordinances are narrowly tailored to address specific secondary effects engendered by a particular category of businesses. Such narrow tailoring should not make content-neutral regulations subject to extraordinary requirements – such as guaranteeing prompt court decisions – that are borne of a censorship context.

CONCLUSION

For the foregoing reasons, your *Amici* urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

SCOTT D. BERGTHOLD
Counsel of Record
Law Office of Scott D. Bergthold, P.L.L.C.
6830 McCutcheon Road
Chattanooga, TN 37421
(423) 899-3025

Attorney for Amici Curiae
International Municipal Lawyers Association
and National League of Cities

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